92-1018

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MARY H. ESPOSITO, WARDEN,

Petitioner,

v.

JAMES K. HOUSTON,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

May a federal habeas corpus court apply *Batson v. Kentucky*, 476 U.S. 79 (1986), retroactively through a Sixth Amendment ineffective assistance of counsel claim to a case which was final when *Batson* was announced?

II.

To render effective assistance of counsel on direct appeal, may an appellate attorney elect to "winnow out" a non-meritorious claim which later gains acceptance?

III.

Is the loss of an opportunity to pursue a certiorari petition to this Court from a state direct appeal decision sufficient to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)?

IV.

Can a federal habeas corpus court apply *Batson v. Kentucky* retroactively, in contravention of *Allen v. Hardy*, 478 U.S. 255 (1986), to satisfy the prejudice prong of the *Strickland v. Washington* test?

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MARY H. ESPOSITO, WARDEN,

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JAMES K. HOUSTON,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Warden Mary H. Esposito, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on July 9, 1992, reissued July 15, 1992, because of clerical error, and the subsequent denial of the request for rehearing on September 15, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is unreported and is reprinted in the Appendix hereto, App. 1, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was initially entered on July 9, 1992, reissued July 15, 1992, because of a clerical error in distribution, and the request for rehearing was denied on September 15, 1992.

The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

Fourteenth Amendment, United States Constitution:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Respondent, James K. Houston, was indicted by the DeKalb County, Georgia, grand jury on October 12, 1983, for the July 11, 1983, malice murder of Eleanor Woods. At a jury trial on March 21-23, 1984, Respondent was found guilty and sentenced to life imprisonment. The murder conviction and sentence were affirmed on direct appeal on January 7, 1985. *Houston v. State,* 253 Ga. 696, 324 S.E.2d 183 (1985).

On September 8, 1988, Respondent filed a petition for a writ of habeas corpus in the Superior Court of DeKalb County, Georgia, and subsequently amended the petition. Respondent claimed he received ineffective assistance of counsel both at trial and on direct appeal from the two sets of lawyers who represented him at both stages. Following an evidentiary hearing on November 23, 1988, the state habeas corpus court denied relief on February 9, 1989. Respondent's motion for relief from judgment from the final order was denied on March 30, 1989. The Supreme Court of Georgia denied the application for a certificate of probable cause to appeal on April 5, 1989.

On May 4, 1989, Respondent filed an application for federal habeas corpus relief in the United States District Court for the Northern District of Georgia, Atlanta Division. Respondent raised issues from both the direct appeal and the state collateral attack. An answer, brief and exhibits were submitted by Petitioner Esposito (hereinafter the Warden).

On September 27, 1989, the United States magistrate judge entered his report and recommendation, recommending that relief be denied. The district court adopted

the report and recommendation over objection on November 30, 1989. Judgment was entered in favor of the Warden on December 4, 1989.

On December 13, 1989, Respondent filed a motion for reconsideration and brief in support. Respondent thereafter filed a notice of appeal, a motion for leave to proceed on appeal in forma pauperis and an application for a certificate of probable cause. On January 19, 1990, the district court denied the motion for reconsideration but granted Respondent pauper's status and probable cause.

Briefs were subsequently submitted on behalf of the parties in the United States Court of Appeals for the Eleventh Circuit. The court then appointed counsel for Respondent, and the parties filed supplemental briefs. Oral argument was had before a panel of that court in November 1991.

On July 9, 1992, the panel entered its decision, affirming the decision to deny relief as to all other claims except the ineffective assistance of appellate counsel issue; the panel found appellate counsel was ineffective for not pursuing a pre-*Batson* claim on direct appeal and found prejudice both from the loss of the opportunity to petition this Court for certiorari from direct appeal on a pre-*Batson* claim as well as prejudice in the form of a valid claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), although Respondent's conviction was final a year before *Batson* was decided. (App. 1-7). The panel reversed the finding of the district court with respect to this claim and remanded the case for further proceedings.

Because incomplete copies of this opinion were distributed to the parties, the opinion was redistributed on

July 15, 1992, with the cover letter specifically granting the parties 21 days from the date of the letter in which to file a petition for rehearing or suggestion of rehearing en banc. (App. 8). The Warden's timely request for rehearing was denied on September 15, 1992. (App. 9-10).

Due to the nature of issues presented, the Warden will not set forth a statement of facts regarding the underlying crimes. Instead, the Warden adopts the facts as found by the Supreme Court of Georgia on direct appeal:

> Houston contends that the evidence was insufficient to find him guilty of murder beyond a reasonable doubt. It is undisputed that Houston shot Woods, but he claims it was in self-defense, after seeing her with a gun. The victim was shot in the back of the head. No other gun was found at the crime scene. There was evidence that Houston shot the victim out of anger or jealousy

Houston v. State, 253 Ga. at 696.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CLARIFY WHETHER *BATSON V. KENTUCKY* MAY BE APPLIED RETROACTIVELY IN THE SIXTH AMENDMENT ATTORNEY ERROR/PREJUDICE CONTEXT.

The panel of the Eleventh Circuit found that Respondent received ineffective assistance of counsel on direct appeal under *Strickland v. Washington*, 466 U.S. 668 (1984), due to appellate counsel's failure to raise as error a

pre-*Batson* challenge to the prosecutor's use of peremptory strikes to which trial counsel had objected. The issue had been pursued by appellate counsel in the amended motion for new trial but not enumerated as error on direct appeal. Further, even though Respondent Houston's direct appeal was decided in January 1985 and his conviction was final at the time *Batson v. Kentucky* was announced on April 30, 1986, the panel found prejudice in two forms: (1) any petition for certiorari from Respondent Houston's direct appeal would have allegedly been filed within the same time frame as when Batson's certiorari petition was granted so that Respondent would have had the "*opportunity* to petition [this] Court on this issue with the benefit of the *Batson* rule"; and (2) Respondent was "actually prejudiced" by this lack of opportunity as he allegedly has "a valid *Batson* claim." (App. 6). The panel found a valid *Batson* claim despite acknowledging that *Batson* is not to be applied retroactively under *Allen v. Hardy*, 478 U.S. 255 (1986). The Warden urges this Court to grant certiorari to reverse the decision of the court below finding both attorney error and prejudice from *Batson's* retroactive application.

The pertinent dates are as follows:

March 21-23, 1984	Respondent's trial
September 5, 1984	Amended motion for new trial filed
November 29, 1984	Enumeration of errors and brief filed on Respondent's behalf on direct appeal
January 7, 1985	Respondent's direct appeal decision

February 19, 1985	Batson's certiorari petition filed
April 22, 1985	Batson's certiorari petition granted
April 30, 1986	*Batson v. Kentucky* decided.

The record further shows that at Respondent's March 1984 trial, following the striking of the jury but before the jury was sworn, trial counsel objected to the prosecutor's use of six peremptory strikes upon *black males only* as violating Respondent's right to due process, to a fair and impartial jury and to be tried by a fair cross-section of the community (Trial Transcript, p. 12-17). The prosecutor then volunteered his reasons for his use of the six challenged strikes as well as his three other strikes (one of which was upon a black female), and the trial court overruled the motion for mistrial. *Id.*

On April 20, 1984, new counsel for Respondent Houston filed a motion for new trial raising only the "general grounds" as to the sufficiency of the evidence. (Trial Record, p. 152). On September 5, 1984, a second new attorney, Elaine M. Gordon of the DeKalb County Public Defender's office as Respondent had been declared indigent, filed an amended motion for new trial on Respondent Houston's behalf. *Id.* at 5, 158-59. Counsel asserted in paragraph one of the amended motion that the prosecutor's use of peremptory strikes resulted in "systematically excluding all *black males* from service as regular jurors in the trial of Defendant's case – Defendant being a black male." *Id.* at 158-59 (emphasis added). The motion for new trial as amended was denied on September 20, 1984. *Id.* at 162.

Attorney Gordon filed the enumeration of errors and brief in Respondent Houston's behalf in the Supreme Court of Georgia on November 29, 1984. The claim regarding the prosecutor's use of peremptory strikes was not raised as error on appeal. The Supreme Court of Georgia affirmed the conviction and sentence on January 7, 1985. *Houston*, 253 Ga. at 696.

More than a month after Respondent Houston's conviction was affirmed, the petition for writ of certiorari in *Batson v. Kentucky* was filed in this Court on February 19, 1985. *Batson v. Kentucky, petition for cert. filed*, 53 U.S.L.W. 3784 (U.S. Feb. 19, 1985) (No. 84-6263). This Court granted Batson's certiorari petition on April 22, 1985. *Batson v. Kentucky*, 471 U.S. 1052 (1985). This grant of certiorari was outside the 90 day period in which Respondent Houston could have sought certiorari to this Court from the January 7, 1985, direct appeal decision. Finally, *Batson v. Kentucky* was announced on April 30, 1986, fifteen months after Respondent Houston's conviction became final. *Batson v. Kentucky*, 476 U.S. 79 (1986).

The Warden submits that, if this Court has already decided that *Batson* is not to be applied retroactively because its costs would be too great, then *Batson* should also not be applied retroactively in the ineffective assistance context as that application would exact the same disruptive effects; otherwise, this Court's decision in *Allen v. Hardy* is rendered meaningless. For these reasons, the Warden urges this Court to grant certiorari upon this issue.

II. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER AN EFFECTIVE APPELLATE ATTORNEY MAY "WINNOW OUT" A NON-MERITORIUS CLAIM WHICH LATER GAINS ACCEPTANCE.

The panel in this case found that attorney Gordon was ineffective for not pursuing the pre-*Batson* claim on direct appeal, even though Batson's certiorari petition had not yet been filed, much less granted, at the time appellate counsel enumerated the errors for the direct appeal. The Warden would urge this Court to grant certiorari upon this issue as it is obvious that the circuit court relied upon hindsight to find that counsel did not act reasonably in failing to anticipate a change in the law.

Attorney Gordon no longer resided within the State of Georgia at the time of the state habeas corpus hearing, was beyond subpoena range and has not testified on this issue. Although there is Eleventh Circuit precedent holding that, in the absence of testimony to the contrary, an attorney's actions are presumed strategic, *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983), the panel found no strategic reason for appellate counsel's failure to have "raised such a promising claim supported by a prominent objection in the record." (App. 4-5). While noting that an appellate attorney does not have to raise every non-frivolous issue on appeal, the panel nevertheless found that an attorney's "neglect of a highly meritorious issue in a direct appeal will be deemed professionally deficient." (App. 3). Only subsequent events have shown that *Batson* issues have gained acceptance indicating the circuit court's utter disregard of this Court's admonition in *Strickland v. Washington*, 466 U.S. at 689, that federal

reviewing courts are not to utilize hindsight or second guess counsel but review counsel's actions from counsel's perspective at the time counsel acted.

The panel faulted appellate counsel for not pursuing the pre-*Batson* issue because other cases of this Court allegedly supported the trial attorney's objection to the prosecutor's use of strikes. (App. 4). However, the Warden submits that the fact that pre-*Batson* issues had been percolating in the lower courts is not the key to resolution of this inquiry as this court's decision in *Allen v. Hardy* declining to apply *Batson* retroactively was based on policy considerations exceeding any threshhold inquiry into whether the claim had been preserved for review. The fact that an issue may ultimately enjoy success does not mean that counsel was ineffective for not pursuing the issue in its embryonic stages. *Reed v. Ross*, 468 U.S. 1, 15 (1984). Furthermore, while giving "lip service" to this Court's holdings in *Evitts v. Lucey*, 469 U.S. 387 (1985), and *Jones v. Barnes*, 463 U.S. 745 (1983), that the proper prosecution of a criminal appeal does not require that every non-frivolous issue be raised, the panel proceeds to fashion a rule requiring counsel "to preserve a claim that is predicated on a clear and persuasive objection in the record." (App. 5, n.*).

While this Court has articulated a test for assessing the performance of trial counsel in *Strickland v. Washington* and has held in *Evitts v. Lucey* that a criminal defendant is entitled to the effective assistance of counsel on direct appeal, this Court has not formulated a precise test for judging an appellate attorney's performance. The

Warden would urge this Court to grant certiorari to determine whether hindsight and second-guessing are proper bases for resolving the issue of an appellate attorney's effectiveness.

III. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE LOSS OF THE OPPORTUNITY TO PETITION THIS COURT FOR CERTIORARI DOES NOT ESTABLISH PREJUDICE UNDER *STRICKLAND V. WASHINGTON.*

The court below found that Respondent was prejudiced by appellate counsel's failure to preserve the pre-*Batson* issue on direct appeal in that Respondent lost the opportunity to apply for certiorari on this issue. (App. 6). This Court recently heard oral argument addressing the parameters of what constitutes prejudice under *Strickland v. Washington* in *Lockhart v. Fretwell,* No. 91-1393 (U.S., argued Nov. 3, 1992). The Warden would urge this Court to grant certiorari in the instant case in light of *Fretwell* to determine whether the loss of an opportunity to petition this Court for certiorari on a pre-*Batson* issue constitutes the type of prejudice warranting the grant of relief under *Strickland v. Washington.*

Even if counsel had raised the pre-*Batson* challenge on direct appeal, the Georgia Supreme Court could not have held Respondent's case to prevent its becoming final before *Batson* was announced because the Georgia Constitution imposes a two-term rule on its appellate courts. "The Supreme Court and the Court of Appeals shall dispose of every case at the term for which it is entered on the court's docket for hearing or at the next term."

1983 Ga. Const. Art. VI, Sec. IX, Para. II. Given that the Georgia Supreme Court has three terms of court a year, Respondent's direct appeal would have been decided before *Batson* was announced. O.C.G.A. § 15-2-4. Thus, the only way to have Respondent's case fall within the ambit of *Griffith v. Kentucky*, 479 U.S. 314 (1987), would have been to seek certiorari to this Court in hopes that this Court would have granted Respondent's petition or would have held Respondent's petition in light of a petition like Batson's being filed within the relevant time frame. However, this avenue is only apparent through hindsight and with knowledge of how *Batson* transpired.

Further, because there is no Sixth Amendment right to counsel to pursue a discretionary appeal such as a petition for certiorari to this Court, *Ross v. Moffit*, 417 U.S. 600, 610 (1974), it would seem to follow that an attorney has no constitutional duty to seek certiorari for an indigent defendant. The opportunity to petition for certiorari arises not under the Constitution but is derived from a federal statute. *Ross*, 417 U.S. at 617. If there is no Sixth Amendment right to counsel, then neither alleged attorney error or prejudice from the lack of a certiorari petition would constitute a sufficient basis for the grant of habeas corpus relief. *Coleman v. Thompson*, ___ U.S. ___, 111 S.Ct. 2546, 2568 (1991).

In this case, however, the court below found prejudice in the form of Respondent's losing the opportunity to petition for certiorari "with the benefit of the *Batson* rule" as Batson's petition was filed within the same time frame that Respondent's petition could have been filed. (App. 6). The court fails to identify *who* would have filed this certiorari petition. The Warden submits that the court

impermissibly engaged in sheer speculation as to what may have happened if the issue had been preserved and someone had filed a certiorari petition on Respondent's behalf or that he would have filed a pro se petition in 1985. The Warden urges this Court to grant certiorari to consider whether the loss of an opportunity to petition for discretionary review to this Court is sufficient to constitute prejudice under *Strickland v. Washington*.

IV. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT *BATSON V. KENTUCKY* SHOULD NOT BE APPLIED RETROACTIVELY TO SATISFY THE PREJUDICE PRONG OF *STRICKLAND V. WASHINGTON*.

The court below also found prejudice in the form of a "valid *Batson* claim," despite having previously acknowledged the rule of *Allen v. Hardy*. (App. 6). The Warden also urges this Court to grant certiorari to determine whether *Batson v. Kentucky* may be applied retroactively in the Sixth Amendment context to find prejudice, even though this Court has already determined as a matter of law that *Batson* is not to be applied retroactively to cases which were final at the time *Batson* was announced.

The panel opinion in this case directly contravenes *Allen v. Hardy* in which this Court held that *Batson* will not apply retroactively to cases which were final at the time *Batson v. Kentucky* was announced. In declining to apply *Batson* retroactively to cases which were final when *Batson* was announced, this Court made no exception for cases where pre-*Batson* type claims had been preserved. In fact, Allen himself had preserved the jury strike issue

at his trial, but, upon finding that *Batson* was "an explicit and substantial break with prior precedent," this Court concluded that the costs of applying *Batson* retroactively were too high. *Allen*, 478 U.S. at 256. Thus, preservation of the claim is not the key to *Batson's* application, but the critical inquiry is whether the conviction was final at the time *Batson* was announced. *Allen v. Hardy*, 478 U.S. at 258 n.1. If *Batson* is not to apply retroactively as a matter of law, then it would seem to follow that prejudice in the Sixth Amendment effective assistance context could not be shown as a matter of law.

Finally, the panel decision in this case portends the erosion of *Teague v. Lane*, 489 U.S. 288 (1989), by allowing petitioners to circumvent a claim which is barred by *Teague* through simply alleging that trial or appellate counsel was ineffective for not preserving the issue and prejudice from consideration of the merits of a claim otherwise barred from review because it is a "new rule." For these reasons, the Warden would urge this Court to grant certiorari to hold that *Batson v. Kentucky* may not be applied retroactively to establish prejudice in the Sixth Amendment ineffective assistance context.

CONCLUSION

Wherefore, for all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision of the United States Court of Appeals as the decision conflicts with established precedent of this Court and also presents questions not previously decided by this Court.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8050

D. C. Docket No. 1:89-CV-932-RLV

JAMES K. HOUSTON,

Petitioner-Appellant,

versus

MARY H. ESPOSITO,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(July 9, 1992)

Before KRAVITCH, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

James Houston petitions this court pursuant to 28 U.S.C. § 2254 (1988) for release from state custody. The petitioner was convicted of murder in Dekalb County, Georgia and sentenced to life imprisonment on March 23, 1984. His conviction and sentence were affirmed on direct appeal, after which he filed a petition for writ of habeas corpus in the Georgia courts. This petition was denied,

and Houston petitioned for habeas corpus relief in the United States District Court for the Northern District of Georgia. That petition was denied on November 30, 1989, and the petitioner appeals to this court.

Houston raises several issues in his brief to this court, including sufficiency of the evidence, ineffective assistance of counsel at trial, erroneous findings of procedural default, improper denial of an evidentiary hearing, and ineffective assistant of counsel on appeal. We find each issue raised by the petitioner, except his ineffective assistance of counsel on appeal claim, to be entirely without merit. Therefore, we **AFFIRM** without discussion the district court's findings as to these meritless issues. With respect to the petitioner's claim of ineffective assistance of counsel on appeal, we **REVERSE** the district court's denial of the petitioner's writ, and we **REMAND** the case.

The petitioner claims that his counsel on appeal did not fulfill her constitutional obligation to effectively assist him in the direct appeal of his murder conviction in the Georgia courts. He argues that she was ineffective by not pursuing an appeal based on the portion of the trial record in which petitioner's trial counsel moved for a mistrial on the ground that the prosecution was racially motivated in utilizing six peremptory strikes to remove six black males from the venire. Furthermore, the petitioner asserts that appellate counsel's inadequate representation prejudiced him by effectively denying him the opportunity to present this jury selection issue to the United States Supreme Court, subsequent to any state court denial of his appeal.

Of course, appointed counsel does not have an obligation to raise on appeal every non-frivolous issue requested by the client. *See Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983). The Supreme Court announced in *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967) that an advocate should "support his client's appeal to the best of his ability" – a duty which in some instances will entail streamlining the arguments pressed on appeal. Nevertheless, in some cases counsel's neglect of a highly meritorious issue in a direct appeal will be deemed professionally deficient. On this record, we find that appellate counsel's representation fell below the range of reasonable professional competence and resulted in actual prejudice, rendering counsel's assistance constitutionally ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1981).

At Houston's trial, defense counsel presented a timely objection and motion for mistrial challenging the jury selection process. Trial Tr. at 12-14. Counsel alleged that the prosecution used its peremptory strikes deliberately to exclude black males from the jury. *Id.* at 13. Responding to defense counsel's motion, the prosecutor indicated:

> I did strike six black males . . . not because they were black or because they were male but because they were both black and male and would be most likely of any people that were present in the courtroom as prospective jurors to be able to empathize or put themselves into Mr. Houston's position. I felt that those people would not be as sympathetic or be as likely to be good State's jurors.

Trial Tr. at 15. A number of Supreme Court cases in force at the time of Houston's trial supported the defense's objection to the prosecutor's admittedly purposeful exclusion of black males. As early as the decision in *Strauder v. West Virginia*, 10 Otto 303, 100 U.S. 303, 310, 25 L.Ed. 664 (1880), the Supreme Court prohibited states from denying a black defendant equal protection by purposefully excluding members of his race from his jury. In *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Court reaffirmed the "consistently and repeatedly applied" principle that exclusion of the members of a given race from juries constitutes a denial of equal protection. *Id.* at 204, 85 S.Ct. at 827. In a memorandum decision, *McCray v. New York*, 461 U.S. 961, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983), five members of the Court agreed that race-based peremptory strikes by the prosecution presented a serious constitutional issue. And, after the time of Houston's appeal, the Supreme Court issued the *Batson* decision, which overruled the *Swain* opinion with respect to the defendant's evidentiary burden, but reaffirmed the principle that racial discrimination in jury selection offends the Equal Protection Clause. *See Pitts v. Cook*, 923 F.2d 1568, 1570-71 (11th Cir. 1991) (treating *Batson* as both a "reaffirmation of principles over a century old" and a change in "how [the prosecution's] forbidden conduct may be proved"). Hence, we cannot hold that Houston's appellate counsel performed with reasonable competence in neglecting to

appeal such a promising claim supported by a prominent objection in the trial record.*

All parties to this appeal are aware that under *Allen v. Hardy*, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986) and *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), *Batson* will not be retroactively applied. Based on this fact, the state alleges that the petitioner's claim of prejudice is based on mere speculation that had counsel pursued the discretionary petition for a writ of certiorari to the United States Supreme Court, his conviction may not have at the time of *Batson* been final and would have been governed by the *Batson* rule. Furthermore, the state argues that the petitioner's speculation affords no basis for a finding of ineffectiveness, especially where the petitioner has no Sixth Amendment right to counsel for a discretionary appeal, such as a petition for certiorari. *See Ross v. Moffitt*, 417 U.S. 600, 610, 94 S.Ct. 2437, 2443, 41 L.Ed.2d 341 (1974).

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* This court's decision in *Pitts*, 923 F.2d at 1574, holding that appellate counsel's failure to raise a *Batson*-type claim prior to the actual *Batson* decision did not establish constitutionally ineffective assistance of counsel is distinguishable from the instant case. In *Pitts*, appellate counsel did not have in the trial record a motion for mistrial by trial counsel based on a *Batson*-type claim or an admission by the prosecutor that his use of peremptory strikes on black jurors was racially motivated. Today, we are not imposing the "require[ment] to be innovative" which the *Pitts* panel cautioned against. *Id.* at 1574. We merely require appellate counsel to preserve a claim that is predicated on a clear and persuasive objection in the trial record.

The state clearly misunderstands the petitioner's claim of prejudice, and we find its arguments unpersuasive. Furthermore, it is possible that Houston's success on appeal would not have depended on the *Batson* holding, considering the prosecution's clear and undisputed admission of racial motivation in utilizing peremptory jury strikes on black males; however, we need not address this issue due to the demonstrable prejudice otherwise inflicted upon Houston. The petition for certiorari in *Batson* was granted during the same time period – 90 days after a determination of the *Houston* direct appeal – that the *Houston* petition for certiorari would have been filed. We agree with the petitioner that it is not mere speculation to conclude that if appellate counsel had raised the jury selection issue on appeal, Houston would have had the *opportunity* to petition the United States Supreme Court on this issue with the benefit of the *Batson* rule. *See Griffith*, 479 U.S. at 328, 107 S.Ct. at 716. Additionally, we find that Houston was actually prejudiced by the loss of this opportunity because the record shows that he has a valid *Batson* claim. Indeed, the prosecutor's admission that he struck potential jurors because they were black males could not appear more clearly in the record.

For the aforementioned reasons, we hold that the district court erred in finding that the petitioner's appellate counsel rendered effective assistance. Accordingly, we **REVERSE** the district court's denial of habeas relief with respect to Houston's claim of ineffective assistance of appellate counsel, and we **REMAND** the case for further proceedings consistent with this opinion.

AFFIRMED in part, **REVERSED** and **REMANDED** in part.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Miguel J. Cortez
Clerk

In Replying Give Number
Of Case And Names Of Parties

July 15, 1992

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 90-8050, HOUSTON v. ESPOSITO
(DC Docket No. 1:89-CV-932 RLV

Due to clerical error, the non-published opinion dated July 9, 1992 in the above styled case may have been released without double sided copying. Please substitute the attached opinion if you receive one without all the pages.

You will have twenty-one (21) days from the date of this letter to file a Petition for Rehearing or Suggestion of Rehearing En Banc.

Very truly yours,

MIGUEL J. CORTEZ, Clerk

By: /s/ Nancy Gilman
Deputy Clerk

:nmg
Encl.

c: Hon. Robert Vining
William D. Ferguson (CA)
Paula K. Smith, Susan Boleyn

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-8050

JAMES K. HOUSTON,

Petitioner-Appellant,

versus

MARY H. ESPOSITO,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Filed Sep. 15, 1992)

Before: KRAVITCH, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the

members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
DEC 31 1992
OFFICE OF THE CLERK

No. 92-1018

In The

Supreme Court of the United States

October Term, 1992

MARY H. ESPOSITO, WARDEN,

Petitioner

v.

JAMES K. HOUSTON,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

James K. Houston, Respondent, hereby respectfully moves for leave to proceed in forma pauperis in this case. Respondent's motion to so proceed in the United States District Court, Northern District of Georgia, was granted on June 19, 1990. On June 21, 1991, pursuant to the Criminal Justice Act, 18 U.S.C. §3006(A) the Court of Appeals, Eleventh Circuit, appointed William D. Ferguson as counsel for Respondent.

Respectfully submitted,

William D. Ferguson

William D. Ferguson
Emory University School of Law
Atlanta, Georgia 30322
(404) 727-6837
Counsel for Respondent

15 pp

No. _____

In The

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MARY H. ESPOSITO, WARDEN,

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v.

JAMES K. HOUSTON,

Respondent

On Petition for a Writ of Certiorari to the
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for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

William D. Ferguson
Counsel for Respondent

Please serve:

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No. _____

In The
Supreme Court of the United States
October Term, 1992

MARY H. ESPOSITO, WARDEN, Petitioner,

v.

JAMES K. HOUSTON, Respondent

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James K. Houston, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's opinion in this case. The opinion is set forth at App. 1 of the Petition herein.

REASONS WHY THE PETITION SHOULD BE DENIED.

1. **Petitioner misstates and misunderstands Respondent's claim and the Court of Appeals holding.**

Contrary to the consistent argument of Petitioner, reiterated below and here and in Questions I and IV of the Petition, this case does not involve the retroactive application of Batson v. Kentucky, 476 U.S. 79 (1986). The Per Curiam opinion of the court below found that "The state clearly misunderstands" Respondent's argument. (App. 6.)

This case involves the issue of ineffective assistance of counsel on appeal which denied Respondent his constitutional right to adequate legal representation. The court below properly and correctly analyzed the case and applied the rules announced by this Court in Strickland v. Washington, 466 U.S. 668 (1986).

2. **There is no substantial issue concerning appellate counsel's inadequate representation.**

During the trial of this case, defense counsel moved for a mistrial based upon the prosecutor's racially motivated discriminatory exercise of peremptory strikes to remove six black males from the jury. Respondent is a black male. The prosecutor candidly stated that he did not strike them "because they were black or because they were male but because they were both black and male . . . ." The record reveals a statement by defense counsel that the issue of racially motivated peremptory challenges was then pending before this Court, though he did not identify the case or cases to which he was referring.

On appeal to the Georgia Supreme Court, Respondent's counsel raised only two issues: insufficiency of the evidence and failure to give a charge requiring close scrutiny of a confession. Uncontroverted evidence showed that Respondent shot the victim in the back of the head and there was evidence to support a finding that he did so out of jealousy or anger. Respondent claimed he shot her in self defense. The court dismissed the first alleged error in one short paragraph of its one page opinion. The other

error was disposed of in two short paragraphs on the ground there was no confession. The errors enumerated by appellate counsel can be accurately characterized as lacking merit and bordering on the frivolous. The trial court's denial of the motion for mistrial based upon the prosecutor's discriminatory exercise of peremptory challenges--the only truly viable and meritorious error--was not enumerated.

At the time of the appeal, counsel reasonably knew or should have known of the cases of Strauder v. West Virginia, 100 U.S. 303 (1880) and McCray v. New York, 461 U.S. 961 (1983). Strauder held unconstitutional the state's purposeful exclusion of members of the defendant's race (black) from the jury. The prosecution here admitted to purposefully excluding males who were black from the jury. In McCray five members of this Court agreed that a serious constitutional issue was raised by such discriminatory use of peremptory strikes and that Swain v. Alabama was due for reconsideration. The justices invited counsel to argue the issue in the lower courts that this court might gather more views. Appellate counsel erroneously declined that invitation and failed to preserve Respondent's right to do so. Based on the foregoing, the Court of Appeals properly found that a reasonably competent attorney should have raised that issue on appeal. The decision is in accord with, and not contrary to, Evitts v. Lucey, 469 U.S. 387 (1985) and Jones v. Barnes, 463 U.S. 745 (1983), neither of which approve failure to raise the only available meritorious claim.

In Strickland, supra, holding that the defendant must show his

representation "fell below an objective standard of reasonableness", Justice O'Connor stated that "no more specific guidelines are appropriate." 466 U.S. at 688. The Court recognized, as did the Court of Appeals in this case, that whether counsel's conduct complied with professional standards involves primarily factual questions of the conduct and the prevailing professional norms in light of the situation before the court. Specific guidelines are not appropriate and application is properly left to the lower courts.

This issue does not warrant expenditure of the scarce resources of this Court.

3. **Appellate counsel's error was prejudicial to Respondent.**

Although Petitioner and the court below spoke in terms of prejudice, it should be borne in mind that prejudice in these cases exists whenever counsel's unprofessional conduct undermines confidence in the outcome of the proceeding. Strickland, 466 U.S. at 694. Prejudice to Respondent is clear in this case.

Whether the Georgia Supreme Court would have reversed the conviction had the issue been raised is problematical inasmuch as the court had recently rejected the argument. Perhaps a Strauder argument would have swung the balance, especially with the purposeful discrimination so clearly demonstrated on the record in this case. Counsel's failure to enumerate, brief and argue this error precluded any determination by the Georgia court.

More importantly, counsel's failure to raise the issue before

the Georgia Supreme Court constituted an absolute bar of Respondent's opportunity to petition this Court for a writ of certiorari. This failure denied the Respondent an opportunity to seek to overturn the conviction which resulted from an unfair trial before a discriminatorily selected jury in violation of Respondent's equal protection rights. Loss of a constitutional right is patently prejudicial. The Eleventh Circuit found that Respondent was actually prejudiced by the loss of the opportunity.

Petitioner charges the court below with "sheer speculation" and complains that the court did not "identify who would have filed this certiorari petition." The state's failure to fulfill its constitutional obligation to provide effective assistance of counsel deprives us of the ability to identify who would have filed the petition. However, the federal courts have first hand knowledge of and experience with public defenders and pro bono attorneys who file certiorari petitions for indigent defendants. Those courts also have considerable experience with prisoners who file pro se petitions. Respondent has demonstrated his own ability to proceed pro se as he did in initiating the petition for the habeas writ in this case. Counsel's error precluded either Respondent or a pro bono attorney or public defender from filing the petition.

Were the Court to conclude that failure of counsel to raise this issue and preserve the opportunity to seek review in this Court did not constitute prejudice, the Court would substantially erode any requirement of effective assistance of counsel on appeal.

Such a conclusion would authorize ineffective assistance of counsel at the expense of the accused's right to a fair trial before a properly selected jury.

It is at the certiorari petition stage that the Petitioner's misunderstanding comes to the fore. Contrary to the assertion of Petitioner, page 11, Respondent has never argued that the Georgia Supreme Court should "have held" or delayed acting upon Respondent's appeal to prevent it from becoming final before the Batson decision was rendered. In fact, there was no way for the court to even know about a certiorari petition by Batson because his petition was not in existence when Respondent's appeal was before the Georgia court. Batson's petition was dated February 19, 1985, five weeks after the Georgia Supreme Court affirmed Respondent's conviction. This attempt to confuse and misstate the issue should be recognized for what it is.

Petitioner's misunderstanding of the essential issue in this case is readily apparent. Petitioner repeatedly attempted to characterize the issue as involving retroactive application of Batson. Respondent does not seek retroactive application of the Batson case. Respondent has consistently argued and the Court of Appeals agreed that it is reasonably probable that this Court would have granted a writ of certiorari in this case and reversed the denial of the mistrial motion based upon the purposeful racial discrimination in the jury selection process. This court could have done so under Strauder v. West Virginia, supra, or upon reconsideration of Swain v. Alabama, 380 U.S. 202 (1965). If the

road to this Court had not been closed by counsel's failure, there is a reasonable probability we would have a Houston rule rather than a Batson rule.

The Eleventh Circuit found that Respondent was actually prejudiced by counsel's error because Respondent "has a valid Batson claim." (App. 6.) That manner of expression may have contributed to Petitioner's misstatement of the issue and misunderstanding of Respondent's argument. Of course, the term "Batson claim" is shorthand for a valid claim of discriminatory jury selection and denial of equal protection of the law. The court's statement does not mean Respondent is now asserting a Batson claim. It is properly read to mean that at the time the case would have been before this Court but for counsel's malperformance, he had a right to a reversal based upon the purposeful racial discrimination in the selection of his jury. Had the road to this Court not been barred, Respondent would not have asserted "a Batson claim" because there was no Batson rule. Rather the argument would have directly addressed the purposefully racially discriminatory jury selection procedure employed by the prosecutor in this case. Respondent's case was tried within a month of Batson's trial and was affirmed less than a month following the affirmance of Batson in state court. Respondent's timely petition for a writ of certiorari would have been filed before the petition by Batson or within forty eight days of the date of Batson's petition. Given the clarity of the record in this case and the stated purposeful nature of the discrimination, it is highly probable that this Court would have

granted Respondent's petition instead of, or in conjunction with, Batson's petition. Clearly, this Court would have reversed the conviction on the basis of the discriminatory jury selection.

Thus, it is highly probable that a different outcome would have obtained but for counsel's failure. That portion of the Strickland rule has been satisfied. Clearly, Respondent does not seek retroactive application of Batson but, instead, has established that his claim of a right to a mistrial based upon the unconstitutional jury selection process would have been upheld, producing a different outcome. The purposeful discrimination practiced by the prosecutor substantially undermines confidence in the outcome of this case.

4. **The decision of the court below is limited by and to the unique circumstances of this case.**

Petitioner continues the attack on the basis that granting the habeas writ in this case permits circumvention of Teague v. Lane, 489 U.S. 288 (1989), Allen v. Hardy, 478 U.S. 255 (1986) and Griffith v. Kentucky, 479 U.S. 314 (1987). Petitioner refuses to understand that this is not a retroactivity case. Further, Petitioner does not state what costs involved under Allen et al. would be involved in this case. A defendant similarly situated to Batson should not be denied application of the rule Griffith v. Kentucky, 479 US at 323. Had counsel's professional duties been properly performed, Respondent's petition would either have been before the court or pending at the time of the Batson case.

There can be no substantial concern that the decision in this unique case "would seriously disrupt the administration of justice." Allen, 478 U.S. at 260. The Allen court expressed deep concern about the task imposed on a prosecutor to produce, many years after the event, evidence of neutral reasons for the exercise of the peremptory challenge. That is not a concern here inasmuch as no evidentiary hearing is necessary. The prosecutor volunteered his purposefully discriminatory reasons on the record. In that regard, this is an even stronger case than Batson.

In the universe of cases in which there may have been discrimination in jury selection prior to the Batson decision, it there is a very low probability that another case like the present one exists. Batson's trial was in February 1984, Respondent's in March 1984. In both cases, defense counsel properly raised the jury selection issue. In Respondent's case the prosecutor admitted his purposefully discriminatory use of peremptory strikes. No such admission appears in Batson and this Court remanded for an evidentiary hearing. Batson's conviction was affirmed in the state court on December 20, 1984, Respondent's, eighteen days later on January 7, 1985. Petitioner's time to file a certiorari petition, had counsel's failure not barred that route, would have expired eighteen days later than Batson's.

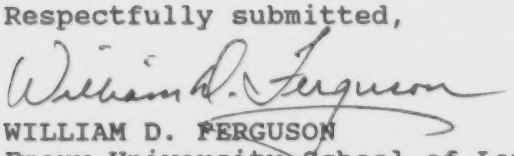
This is a unique case that is factually distinguishable from other cases involving this issue. No issues of national importance are involved because of the factual nature of the case. These unique facts limit the decision of the court below to this case and

no other. Any claims of a serious adverse affect upon judicial administration are not well founded. There is no reason to fear the decision below will permit circumvention of any decision of this Court. Indeed, a contrary decision would drastically reduce the constitutional right of an accused to appellate counsel who perform their duties in an effective manner.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



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No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARY H. ESPOSITO, WARDEN, Petitioner

v.

JAMES K. HOUSTON, Respondent

CERTIFICATE OF SERVICE

I, William D. Ferguson, a member of the Bar of this Court, do hereby certify that on this 31st day of December, 1992, one copy of the Motion for Leave to Proceed in Forma Pauperis and one copy of Respondent's Brief in Opposition in the above-entitled matter were mailed, first class postage prepaid, to Paula K. Smith, Assistant Attorney General, Counsel of Record for Petitioner, 132 State Judicial Building, 40 Capitol Square, S. W., Atlanta, Georgia 30334. I further certify that all parties to be served have been served.

William D. Ferguson

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